IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 4069 of 1988

WITH

SPECIAL CIVIL APPLICATION NO. 4549 OF 1988

WITH

SPECIAL CIVIL APPLICATION NO. 6589 OF 1988

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

and

Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ABDUL RAZAAK MOHMDBHAI (SCA NO.4069/88)
HEIRS OF DECEASED ABDUL GANI DATA (SCA NO. 4549/88)
AMBIKA STONE & STATIONERY STORES (SCA NO. 6589/88)

Versus

STATE OF GUJARAT

Appearance:
SCA NO.4069/88 & 4549/88

MR SH SANJANWALA for Petitioner No. 1
MR RC KODEKAR, ASST. GOVT. PLEADER for Respondent No. 1
NOTICE SERVED for Respondent No. 2
MR PRASHANT G DESAI for Respondent No. 3

SCA NO. 6589/88

MR SH SANJANWALA for Petitioner No. 1
MR RC KODEKAR, ASST. GOVT. PLEADER for Rest No. 1,2
NOTICE SERVED for Respondent No. 2
MR PRASHANT G DESAI for Respondent No. 3
MR TS NANAVATI for Respondent No.4

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 10/10/2001

COMMON C.A.V. JUDGEMENT

(Per : MR.JUSTICE B.C.PATEL)

#. All these three petitions raise a common question, and hence are disposed of by a common judgment.

#. Shorts facts of the case, as it emerges from the respective petition, are as follows:

(1). Spl. C.A. No. 4069/88

Notification under the provisions of section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act), the copy of which is produced at Annexure 'A', came to be published on 16.4.1987 for acquisition of certain land, to be precise, Ward No.10, City Survey No.2099, 2507 Paiki admeasuring 210 H.-70A.-47 Sq. Mtr and 44 H.-41 A.-25 Sq Mtr. both situated at Chorasi in Surat City, for the purpose of Open Space for Surat Municipal Corporation.

The petitioner lodged his objection on 16.9.1987, vide Annexure 'B', interalia stating that he was occupying ground floor premises in the area sought to be acquired; That the premises was hired on rent by the petitioner as well as one Abdul Sattar Noormohammed, who was the only partner with the petitioner; That after retirement of Abdul Sattar from the partnership, the petitioner is carrying on business at the aforesaid place as the owner. It is further submitted that the properties are situated in the residential and business localities; That there is no need for the Surat Municipal Corporation to have any open space.

Thereafter, the Government published notification under section 6 of the Act on 16th June 1988 for acquisition of the aforesaid lands, the copy of which is produced at Annexure 'C'.

SPECIAL CIVIL APPLICATION NO. 4549/88

The petitioners of this petition have contended in the petition that their father was the tenant of the premises bearing Nondh No. 2587 of Ward No.10 which consisted of a ground floor and terrace, and the same was being used for residential purposes. After the death of their father, they have become tenants and are paying rent to the landlord.

The notifications challenged in this petition are also the same notification referred to hereinabove which is the subject matter of Spl. C.A. No. 4069/88.

The petitioners have placed on record copies of the notifications at Annexure 'A' and 'C' and the objection dated 17.9.1987 filed by petitioner at Annexures 'C'.

SPECIAL CIVIL APPLICATION NO. 6589/88.

The petitioners of this petition have contended in the petition that the petitioner No.1 is a tenant and is carrying on business in the rented premises since about 20 years. It is contended that they are in occupation of a very small area for their shop and factory premises. It is contended that the said premises is hardly creating any obstacle to the vehicular traffic. From the tenor of the petition it appears that the petitioner is occupying a premises situated at Ward No.5. On 16.4.1987, a notification under section 4 was published for acquiring city survey No. 1742 and 1744 of Ward No.5 admeasuring 98.H-66.A-33 Sq. Mtr and 198.H-98.A-22 Sq. Mtr. situated in Choryasi, Surat City. The petitioners submitted their objection on 11.1.1988. The Government thereafter published notification under section 6 of the Act.

The petitioners have placed on record copies of the notifications at Annexure 'A' and 'C' and the objection dated 11.1.1988 filed by petitioner at Annexures 'C'.

#. In all the aforesaid matters, by the aforesaid notifications published under section 4 of the Act,

public at large were informed that the lands specified in the Schedule to the notification needed for a public purpose, i.e. open space, were to be acquired for the Surat Municipal Corporation. All persons interested in the said lands were, therefore, warned not to obstruct or interfere with any Surveyors or persons employed upon the said lands for the purpose of the said acquisition. It was also conveyed that any contracts for the disposal of the said lands by sale, lease, mortgage, assignment, exchange or other wise or any outlay or improvement made therein without the sanction of the appropriate authority after the date of the notification will be disregarded by the officer assessing compensation for such parts of the lands when finally acquired.

#. After the notifications were published, the petitioners lodged their objections. After considering the objections in the inquiry made under section 5.A of the Act, report was forwarded and the State Government was satisfied that the lands required to be acquired at public expenses for public purpose specified in the Schedule, that is to say: open space for Surat Municipal Corporation. On being satisfied about the requirement of the lands, notification under section 6 of the Act were published. It is these notifications published under sections 4 and 6 of the Act that are challenged in these petitions, contending that that State Government has no authority to acquire the land for open space for Surat Municipal Corporation; That the words "open space" are so vague and it does not give necessary details so as to make effective representation. It is contended that as notifications are vague, petitioners have been deprived of making effective representation, and, therefore, notifications should be quashed and set aside.

#. It is pointed out by the learned advocates appearing for the respondents, particularly Mr. T.S. Nanavati, that the award has been made by the Special Land Acquisition Officer and the amount of compensation has also been received by the land owners. The respondent Corporation has also placed before us copy of the award made under section 11 of the Act on 25.2.1988 for the lands bearing survey No. 1741, 1742 and 1744.

#. On behalf of the respondent Corporation, in one of the matters, viz. Spl. C.A. No. 6589/88, reply is filed stating that the land in question was kept under reservation for Surat Municipal Corporation for the purpose of open space under the Development Plans of Surat Urban Development Authority (for brevity, SUDA, hereinafter). The said lands were sought to be acquired

as per resolution No. 1420 dated 13.1.1981. The same has been sanctioned by Urban Development and Urban Housing Development, State of Gujarat, by its letter dated 28.1.1986, a copy of which is produced at Annexure-I. The resolution is produced on record at Annexure-II. On behalf of the respondent Corporation, it has been pointed out that after following the procedure laid down under the Act and strictly in accordance with law, awards have been made. On behalf of the respondent Corporation, it is specifically stated that nothing has been pointed out in the petition that any breach is committed while issuing notifications under section 4 or under section 6 of the Act or that the procedure laid down in the Act and particularly under section 5.A has not been followed. On behalf of the respondent, it is stated on oath that:

> "I deny that notification under section 6 is bad and illegal inasmuch as no legal procedure as required under sections 4 and 5A of the Act has been followed the petitioners have not been given adequate opportunity of hearing as alleged."

The deponent has pointed out that it is incorrect to say that the petitioners have objected to the said acquisition on the ground that they have not been given any effective personal representation (sic. hearing) under section 5.A of the Act. It is also denied that open land is being utilized by the respondents as alleged.

#. With regard to open space, averments were made in the petition that it would not serve public purpose. On behalf of the respondent Corporation it has been pointed out in paragraph 16 of the affidavit-in-reply that open space with regard to survey No. 1551, 1552, 1699, 1743, 1732, 1733, 1688, 1855, 1856 and 1959, the possession is either with the State Government or with the Corporation in most of the cases, except in some cases in survey No. 1688, 1551 and 1552. Thus, it is pointed out that wherever it is necessary, effective steps have been taken by the respondent Corporation. After the reply by the Corporation, there is no affidavit-in-rejoinder by the petitioner denying the averments made therein by the respondent Corporation.

#. Learned advocate Mr. Sanjanwala thereafter raised only one question before the Court, interalia, that "open space" as mentioned in the notification cannot be treated as a public purpose. The learned advocate Mr.Sanjanwala appearing for the petitioners stated that the land was

not at all needed for public purpose and the purpose mentioned in the notification is vague. He further submitted that on the basis of such vague notification, the lands cannot be acquired as that would not give an opportunity to the claimants to make proper representations. Mr. Sanjanwala placed strong reliance on the decision of the Apex Court in case of MUNSHI SINGH & ORS. V/S. UNION OF INDIA reported in AIR 1973 S.C. 1150 in which the Court pointed out that the person interested in the land proposed to be acquired must have an opportunity to submit his objections and that he can do only if the notification while mentioning the public purpose gives some definite indication or particulars of the purpose which would enable the persons concerned to object effectively. In the case before the Apex Court, the notifications merely mentioned that the land was needed for "planned development of the area" and there was no proof that the interested persons were either aware of or were shown the scheme or the master plan in respect of the planned development. Under the circumstances, the Apex Court held that the persons were unable to object effectively and therefore the acquisition proceedings were held liable to be quashed. Para 8 of the said judgments reads as under :

"As already noticed in the notifications under s. 4 all that was stated was that the land was required for "planned development of the area". There was no indication whatsoever whether the development was to be of residential and building sites or of commercial and industrial plots nor was it possible for any one interested in the land sought to be acquired to find out what kind of planned development was under contemplation i.e. whether the land would be acquired and the development made by the Government or whether the owners of properties would be required to develop a particular area in a specified way. If the Master Plan which came to be sanctioned on September 4, 1962 had been available for inspection by the persons interested in filing objections or even if the knowledge of its existence on the part of the appellants had been satisfactorily proved the position may have been different. In that situation the appellants could not claim that they were unable to file objections owing to the lack of any indication in the notification under s. 4 of the nature of development for which the area was being requisitioned. On behalf of the State it has been pointed out that the appellants had

themselves filed a copy of the Master Plan which was sanctioned on September 4, 1962 and that it was a matter of common knowledge that the Master Plan was under preparation. The details relating to the Master Plan and the Plan itself had been published in the local newspapers and the appellants could have easily discovered what the proposed scheme was with regard to the development of the area in which they were interested. In view of the peculiar circumstances of these cases we gave an opportunity to the State to apply for amendment of its return since nothing had been said about these matters therein and to produce additional evidence in support of its allegations. Such a petition was filed and certain documents were sought to be placed on the record. After a careful consideration of the petition for amendment and the evidence sought to be adduced we dismissed the prayer for amendment as well as for production of additional evidence as we were not satisfied that the documents sought to be produced were either relevant or were required to enable this Court to pronounce judgment."

Mr. Sanjanwala submitted that in the case before the Apex Court, there was no indication with regard to the development and its nature -whether it was required for residential, commercial or industrial. In the instant case, there is no dispute that the lands were sought to be acquired under the Land Acquisition Act in view of the reservation in the development plan. Sec.12 of the Gujarat Town Planning and Urban Development Act, 1976 (hereinafter referred to as the Development Act) is required to be considered. The said section reads as under :

" A draft development plan shall generally indicate the manner in which the use of land in the area covered by it shall be regulated and also indicate the manner in which the development therein shall be carried out."

Reading several clauses, it is clear that care is taken whereever it is required to be specifically indicated the purpose of reservation or the purpose for which the land reserved is to be used. viz. residential, industrial, commercial, agricultural and recreational purpose. The purpose of reservation is also indicated in clause `B' of Sub-sec. 2 of Sec. 12 which specifically refers "open space". Sub-clause `m' of

Sub-Sec. 2 of Sec. 12 also refers to the provision for controlling and regulating the use and development of land within the development area including imposition of conditions and restrictions in regard to open space to be maintained for buildings, the percentage of building area etc.

#. Once it is pointed out that in accordance with the provisions of the Development Act a Town Planning Scheme, may be preliminary or final, has been approved by the said Government, the effect of sanction to the preliminary or the final scheme by the State is laid under sub-section 3 of section 65 of the Act. Section 65(3) of the said Development Act reads as under:-

"(3). On and after the date fixed in such notification, the preliminary scheme or the final scheme, as the case may be, shall have effect as if it were enacted in this Act."

In other words, statutory finality is given to the scheme after the sanction by the State Government and issuance of notification in the official gazette the scheme become part of the legislation itself.

It is in view of this, the Scheme is required to be implemented and for implementing the said scheme, the lands were sought to be acquired and in our opinion for maintaining the ecology, sanitation, recreation, play ground and ventilation purpose, open space is a must.

##. Mr.Desai, learned Advocate appearing for the respondent submitted that in a Town Planning Scheme when the land is earmarked for open space, it is obviously for public purpose for the purpose of maintaining ecology and hygienic environment. Even the land so reserved or earmarked cannot be used for other purpose. In case of VIRENDER GAUR AND OTHERS V/S STATE OF HARYANA AND OTHERS reported in (1995)2 S.C.C. 577 the question was examined by the Apex court as to whether there is power to lease or deal with the property when it is required to be kept as an open land. The Apex Court pointed out that :

"the land is vested in the Municipality and the Government has no right and title or interest therein. They have no power to give either by lease to Punjab Samaj Sabha or deal with the property as if the land vested in it. Therefore, the grant of lease by the Government in favour of the Punjab Samaj Sabha was clearly without authority of law and jurisdiction." The court,

further pointed out that "the open lands, vested in the Municipality, were meant for the public amenity to the residents of the locality to maintain ecology, sanitation, recreation, playground and ventilation purposes. The buildings directed to be constructed necessarily affect the health and the environment adversely, sanitation and other effects on the residents in the locality. Therefore, the order passed by the Government and the action taken pursuant thereto by the Municipality would clearly defeat the purpose of the scheme. It is not possible to accept the contention that for non-user of open land by the Municipality for more than two decades, the land stood divested from the Municipality and vested in them. Yet the Municipality has to use the land for the purposes envisaged in the scheme read with those found in Sec. 61 unless unavoidable compelling public purpose require change of user. Acceptance of the argument encourages pre-emptive action and conduct, deliberately chartered out to frustrate the proceedings and to make the result fait accompli.

The word `environment' is of broad spectrum which brings within its ambit "hygienic atmosphere and ecological balance". It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment. The State, in particular has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. Environmental protection, therefore, has now become a matter of grave concern for human existence. Promoting

environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore, there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment."

##. Yet there is another decision of the Apex Court in case of BANGALORE MEDICAL TRUST V/S B.S.MUDDAPPA AND OTHERS reported in (1991)4 S.C.C. 54 in which it was held that open space reserved for public park in development scheme duly approved and published under the Act cannot be converted into a civic amenity site for the purpose of hospital/nursing home. Open space as well as hospital/nursing home are public purposes but when it is possible to change one purpose to another public purpose and when it is not possible is pointed out in paras 23,24 & 25 as under :

23. The scheme is meant for the reasonable accomplishment of the statutory object which is to promote the orderly development of the city of Bangalore and adjoining areas and to preserve open spaces by reserving public parks and playgrounds with a view to protecting the residents from the ill-effects of urbanization. It meant for the development of the city in a way that maximum space is provided for the benefit of the public at large for recreation, enjoyment, `ventilation' and fresh air. This is clear from the Act itself as it originally stood. The amendments inserting Sec. 16(1)(d), 38-A and other provisions are clarificatory of this object. The very purpose of the BDA, as a statutory authority, is to promote the healthy growth and development of the city of Bangalore and the areas adjacent thereto. The legislative intent has always been the promotion and enhancement of the quality of life by preservation of the character and desirable aesthetic features of the city. The subsequent amendments are not a deviation from or alteration of the original legislative intent, but only an elucidation or affirmation of the same.

24. Protection of the environment, open spaces for recreation and fresh air, playgrounds for children, promenade for the residents, and other

conveniences or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme. It is that public interest which is sought to be promoted by the Act by establishing the BDA. The public interest in the reservation and preservation of open spaces for parks and playgrounds cannot be sacrificed by leasing or selling such sites to private persons for conversion to some other user. Any such act would be contrary to the legislative intent and inconsistent with the statutory requirements. Furthermore, it would be in direct conflict with the constitutional mandate to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens.

25. Reservation of open spaces for parks and playgrounds is universally recognized as a legitimate exercise of statutory power rationally related to the protection of the residents of the locality from the ill-effects of urbanization."

The court also considered the decisions delivered by the Supreme of the United States which upheld a zoning ordinance which provided "....it is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant impacts, such as ....pollution.... destruction of scenic beauty, disturbance of the ecology and the environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl." Upholding the ordinance, the Supreme Court of the United States pointed out that the zonic ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision of open space areas." In view of what we have discussed herein above, it is clear that "open space" is a public purpose and it is not necessary to indicate by using any further adjectives for the purpose for which it is required to be kept open. In space which is required to be kept open, no construction is to be carried out for maintaining ecological balance as indicated by the Apex Court herein above.

##. In view of the scheme of the Development Act, once the State Government has sanctioned the draft development plan, it has the effect of the law as if the law is made

by the Legislature. Sec. 17(1) (d) of the Development Act reads as under :

" The sanction accorded under clause (a), clause (b) or clause (c) shall be notified by the State Government in the Official Gazette and the draft development plan together with the regulations so sanctioned shall be called the final development plan."

In view of this for the purpose for which the land is designated in the plan, as specified in clause (b), clause (c), clause(f), clause (k), clause (h) or clause (o) of Sub-sec. 2 of Sec. 12 may be acquired. The lands may be acquired either by an agreement or under the provisions of the Land Acquisition Act, 1894 and if the lands are not acquired as indicated in Sec. 20(1) of the Act, the consequences would follow as indicated in the sub-sec. (2) of Sec. 20.

##. It was submitted that as the land in question was designated as open space in the draft development plan, it was the bounden duty of the local authority in the instant case to initiate the acquisition proceedings under sec. 20 of the Development Act and therefore the proceedings initiated under the Land Acquisition Act by issuance of notification under Sec. 4 & 6 and following the procedure, should be quashed.

##. It was further submitted that even award has been made in the instant case. Mr. Desai contended that once the award is made at a belated stage, the petitions should not be entertained further. The petitioners have not approached the Court soon after the notifications published under section 4 of the Act. They actively participated in the proceedings.

##. As indicated earlier, the Land Acquisition Officer has made his award offering the amount of compensation to the persons concerned. If the claimant has a desire to get more compensation, he has to take appropriate proceedings as laid down in the Act, but certainly bypassing that procedure, one cannot approach this court. No doubt, the only contention raised before us is that the notifications being vague, it should be held that there is non-application of mind, and no sufficient and adequate opportunity was given to make representation in the absence of specifying the purpose. This submission has no merit in view of what the Apex Court has stated in the aforesaid two cases. When the Development Authority has thought it fit, it cannot be said that the purpose is

not public purpose. With a view to point out the necessity and to countenance the submission made by Mr. Sanjanwala, Mr.Desai learned Advocate for the respondents has placed reliance on the decision of the Apex Court in case of HER HIGHNESS MAHARANI SHANTIDEVI P GAIKWAD V/S SAVJIBHAI HARIBHAI PATEL AND OTHERS reported in (2001)5 S.C.C. 101 and drew our attention to paras 30 & 41 :

" 30. If the position had rested in terms of what has been stated above, the consequences may have been different. It was, however, not so. Under the aforesaid Gujarat Act, on 17-5-1979, draft development plan under Section 13 was published wherein the suit land was designated as "open space, sport stadium, bus terminus and court". During the pendency of the suit, on 25.1.84, the final development plan prepared by the Vadodara Urban Development Authority issued under the Gujarat Act came into effect. As per the said final development plan, the land in question is reserved for open space etc. as stated in draft development plan dated 17.5.79.

41. In the present case, in the draft development plan of 1979 which was finalized during the pendency of the suit, the land in question is reserved for open space etc. It cannot be doubted that the agreement had been entered into between the parties mainly and rather only with the object of construction of residential houses under the Scheme under Section 21 of the ULC Act for accommodation of weaker sections of the society. In May 1979, it became evident that it will not be possible to construct residential houses in view of what was provided in the master plan. There is no substance in the contention that assuming the prescribed land use is "open space", still there will be no impediment in the implementation of the Scheme in as much as there is no absolute bar for construction of residential houses. This is not the basis on which the competent authority had considered the matter. The agreement is clearly incapable of being specifically enforced. Under these circumstances, there is no question of any inconsistency and thus Section 42 of the ULC Act cannot have any applicability."

##. Relying on the aforesaid paragraphs, Mr.Desai submitted that under the development plan, it becomes necessary for the authority while submitting the plans to

see that some open space is provided and it is for this purpose before the draft development plan became final, opportunities were given and it was for the petitioner to raise objection at that time. But once, irrespective of objections raised or not, if the plan has become final then it is required to be implemented and operated as such, unless there are subsequent changes in the plan.

##. Mr.Sanjanwala submitted that in view of Apex Court Judgment in case of MUNSHI SINGH AND OTHERS (supra), notification must clearly spell out the purpose. He submitted that mere mentioning "open space" is not sufficient. This contention cannot be accepted for the simple reason of requirement of keeping space as open space". So far as "planned development of the area" as words used in a notification under sec. 4 of the Act, the Apex Court pointed out that in absence of nature of development i.e. whether development was to be of residential and building sites or of commercial and industrial plots, was not specifically stated and thus nature of development for which the area was requisitioned was not clear. In the instant case, there is no question of any vague statement as the space is required to be kept as open space only.

##. Mr. Sanjanwala, learned Advocate submitted that the petitioners are poor persons and will suffer irreparable loss. In the instant case, amount of compensation has been paid and if one is not satisfied with the amount awarded, the provision is made in the Act to approach the authority for making a Reference. Once we come to the conclusion that the notifications under Sec. 4 & 6 which were issued for open space and that too as required in the development plan, it cannot be said that it is not for public purpose. If the land is to be kept open, there is no question of indicating as to whether it is to be kept open for garden or for parking or for future construction because it is to be kept as "open space". For garden etc. there are other provisions in sec. 17 of the Development Act. In view of what is stated hereinabove, in the instant case, we are satisfied that after following the procedure, in one case award has been made. The petitioner has come to the court at a belated stage and there is no substance that the land cannot be acquired for open space.

##. In view of what is stated hereinabove, we are of the view that the notifications cannot be said to be vague in the instant case, as the space is required to be kept as open space. Therefore, the only contention raised by learned Advocate Mr. Sanjanwala fails, and the same is

required to be rejected. Hence, all the three petitions stand dismissed. Rule is discharged. Interim relief is vacated. No order as to costs.

(B.C.PATEL, J)

csm./ (SHARAD D DAVE, J)